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No. 04-1264

In the
Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioners,

v.

JOHN A. CARDEGNA AND DONNA REUTER,

Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are law professors whose teaching and scholarship involve the fields of contracts, commercial law, and related areas of law. The Federal Arbitration Act incorporates the law of contracts into its Section 2, which–absent a maritime transaction–requires a "contract" for the FAA to apply. *Amici* seek to provide perspective on the common law doctrine that a centrally illegal bargain is *void ab initio* as a contract. Florida follows this venerable approach.

SUMMARY OF ARGUMENT

The question presented in this case is whether Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, preempts state law so as to bar a state court from deciding whether loan transactions alleged to be criminal are *void ab initio* as contracts, so that no part of them–including any arbitration clause–is given legal effect. The Florida Supreme Court concluded that the FAA does not preclude a state court asked to compel arbitration from first deciding whether the payday lending transactions in question violated Florida felony and misdemeanor statutes against loansharking.[1] According to the Florida Supreme Court, if the loans are found illegal, then under Florida common law, they would not be given legal effect as contracts and thus none of their provisions would be valid and enforceable. *Cardegna v. Buckeye Check Cashing,*

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[1] It should be noted that after the transactions in issue in this case, Florida enacted a statute permitting high rates of interest in payday loans, while also providing for regulation of providers and of certain terms. Fla. Stat. §§ 560.402-560.408 (Added by Laws 2001, c. 2001-119, § 13, eff. Oct. 1, 2001; Amended by Laws 2003, c. 2003-261, § 725, eff. June 26, 2003). The allegation of the borrowers here is that prior to enactment of this law, Buckeye violated applicable criminal loansharking statutes. See Fla. Stat. §§ 687.071(1)(f), 687.071(2)-(3).

Inc., 894 So. 2d 860, 863 (Fla. 2005). Furthermore, the Florida Supreme Court held that where one party makes a colorable allegation that there was no contract due to illegality, a state court should not compel arbitration until it decides the illegality issue. *Id.* at 865.

This case involves a basic principle of federalism. Contract law is state law, and this Court disfavors preemption in areas traditionally governed by state law. *See Bates v. Dow Agrosciences*, LLC., 125 S. Ct. 1788, 1801 (2005). The only possible type of preemption here is implied conflict preemption. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S.468, 477-78 (1989). This Court has held that Section 2 of the FAA preempts state law that targets arbitration clauses for disfavored treatment, not that it preempts generally applicable state contract law as applied to bargains with arbitration clauses. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Far from being in conflict with general contract law, FAA Section 2 explicitly incorporates contract law into its scheme, using the word "contract" four times.

The FAA requires any court called upon to compel arbitration under the FAA to determine whether the FAA is applicable. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) (deciding, as the threshold question in the case, whether the agreement in question was a contract in commerce covered by FAA Section 2). Because there is no federal district court jurisdiction in this case and a state court is being asked to compel arbitration, the only FAA provision in issue is Section 2. The relevant language of that section sets a threshold requirement of a "contract" in order for the FAA to

be applicable to validate an arbitration clause. If no contract is recognized under Florida law due to criminal illegality, the FAA does not operate to validate the arbitration clause. Issues about FAA applicability under Section 2, including whether there is a "contract," must be decided by any court, state or federal, that is asked to stay litigation or compel arbitration.

The legal term "contract" has long been reserved for a promise or set of promises that the law enforces or in some way treats as creating a duty. RESTATEMENT (SECOND) OF CONTRACTS, Section 1 (1981) and RESTATEMENT OF CONTRACTS, Section 1 (1932). Respecting state public policy enacted in its criminal statutes, Florida common law denies the existence of a contract in a criminal loansharking transaction. The transaction is *void ab initio* as a contract, meaning the bargain is not a contract at all. To protect the integrity of its courts, Florida common law refuses judicial aid in the enforcement of any provision in a centrally criminal transaction. This approach is in keeping with longstanding Anglo-American contract law doctrine going back at least 150 years before enactment of the FAA, when Lord Mansfield wrote, "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Holman v. Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (King's Bench 1775). To avoid giving aid to a criminal, a Florida court must as a first step decide whether the transaction is illegal.

In summary, the scope of this case is narrow in many ways. It comes from state, not federal court, and raises an issue only under FAA Section 2: whether Section 2 preempts the contract law of states, such as Florida, that treat centrally illegal bargains as *void ab initio* and therefore not contracts.

ARGUMENT

I. A COURT ASKED TO COMPEL ARBITRATION UNDER THE FAA MUST FIRST DECIDE WHETHER THE FAA APPLIES, INCLUDING ANY COLORABLE ISSUE ABOUT THE EXISTENCE OF A CONTRACT UNDER STATE LAW.

A. NOTHING IN SECTION 2 OF THE FAA PREEMPTS GENERALLY APPLICABLE STATE LAW CONCERNING WHETHER A CONTRACT EXISTS.

This Court must interpret Section 2 of the FAA to decide this case. Section 4 explicitly applies only when a federal district court is asked to compel arbitration in a case in which it otherwise has jurisdiction.[2] In this case, when Buckeye attempted to invoke Section 4 to compel arbitration, the federal district court remanded the case to state court, holding that Buckeye had failed to establish that the amount in controversy exceeded the threshold for diversity jurisdiction. Pet. Brief at 7.

There is no indication in the language of Section 2 that it preempts Florida common law concerning illegal bargains *void ab initio* as contracts. To the contrary, under the only applicable language of FAA Section 2, there must be a

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[2] *See Southland Corp. v. Keating*, 465 U.S. 1, 16, n. 10 (1984), stating: "In holding that the Arbitration Act preempts state law that withdraws the power to enforce arbitration agreements, we do not hold that §§3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state court proceedings."

"contract" for the federal statute to apply and validate an arbitration clause in that contract. Furthermore, a reading of the FAA as a whole shows that the question whether a contract was formed or exists at all, so as to make the FAA applicable, is a threshold question for the court, whether the case is in state or federal court. The sections of the FAA are "integral parts of a whole." *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 201 (1956) (discussing FAA §§ 1-3). Sections 3 and 4 of the FAA assume a transaction within the scope of the federal statute under Sections 1 and 2. *Id.* and *Prima Paint*, 388 U.S. at 401. Section 2 applies when either a state or a federal court is presented with an issue concerning whether a dispute is arbitrable under the FAA. Under Florida common law and the common law of some other states, certain illegal transactions are not given effect as contracts. In such cases, the FAA's threshold requirement of "a contract" is not met, and thus the FAA does not apply to validate an arbitration clause in the deal.

B. THE FAA DOES NOT APPLY TO VALIDATE AN ARBITRATION CLAUSE IN THIS CASE UNLESS THERE IS "A CONTRACT," A THRESHOLD QUESTION FOR A COURT.

Section 2 of the FAA validates and makes enforceable written arbitration clauses in certain transactions and contracts. The only category applicable here is when there is "a written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a dispute thereafter arising out of such contract ...."[3] The operative language uses the word "contract" twice. First, there must be a written provision for

[3] The other categories are "a written provision in a maritime transaction...to settle by arbitration a dispute thereafter arising out of such ...transaction..." or "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal...."

arbitration in "a contract." Furthermore, the dispute to be settled by arbitration must "arise out of such contract."[4] The word "contract" is not used casually to refer to a writing, because the requirement of a written provision is separately spelled out. Also, the second reference to "a dispute thereafter arising out of such contract" makes clear that "contract" is used to refer to more than the writing. Finally, the use of the word "contract" in the savings clause at the end of Section 2, referring to legal and equitable grounds for revocation of any contract, also makes clear the word "contract" is used in Section 2 in the technical legal sense of an enforceable promise or set of promises, as discussed further below in Section II.A. (distinguishing a "contract" from an "agreement.")

Although not in issue in this case, Section 1 provides definitions applicable in Section 2.[5] Courts must decide issues under Section 1 and 2 that go to the applicability of the FAA. For example, this Court has interpreted the phrase in Section 2 "involving commerce" as the equivalent of "affecting commerce" and as extending the FAA's reach to the extent of Congress's power under the Commerce Clause. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-277 (1995).

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[4] Also, although not in issue in this case, Section 2 requires that the contract's arbitration provision must be "written," which under the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7031, includes an electronic record, and the contract must be one "involving commerce."

[5] Section 1 defines "maritime transactions" broadly to cover contractual and non-contractual transactions, including, for example, "collisions," which is presumably why the phrase "maritime transactions" is used rather than "maritime contracts." Section 1 also defines "commerce" to cover, *inter alia*, "commerce among the several states."

In cases in state or federal court, Section 2's requirements must be met for the FAA to apply: there must be a written arbitration clause and, absent a maritime transaction, a contract involving commerce. In addition, in cases in state or federal court, the last clause of Section 2 is a savings provision for certain general legal and equitable contract law doctrines. Section 2 validates a written arbitration clause in a maritime transaction or contract involving commerce, but with this limitation: "save upon such grounds as exist at law or in equity for the revocation of any contract." Section 2 uses the word "contract" a total of four times, while Sections 3 and 4 do not use the word at all, but rather refer to an "agreement" for arbitration. Given the cumulative nature of the FAA, Sections 3 and 4 assume a contract, absent a maritime transaction.[6] *Prima Paint*, 388 U.S. at 401.

As discussed in Section II below, Florida law does not recognize the existence of a contract in cases of bargains *void ab initio*. Thus, the FAA, which requires a "contract" in this case, does not apply to validate an arbitration clause. Where state law makes a bargain *void ab initio* as a contract due to criminal illegality, there is no contract to make the FAA applicable.

Contract law questions, including whether a contract exists and whether there is a contract defense to enforcement of an arbitration clause under the savings clause of Section 2, are

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[6] In cases involving federal district court jurisdiction under Sections 3 (concerning staying federal litigation) or 4 (concerning ordering arbitration), Sections 1 and 2 also apply. Sections 3 and 4 are not in issue in this case because there is no basis for federal district court jurisdiction, but the cumulative nature of Sections 1-4 is a key feature of the structure of the FAA.

matters of state law. This Court has so recognized, in discussions of the savings clause for general doctrines giving grounds for revocation of any contract. *Perry v. Thomas*, 482 U.S. 483, 492, n. 9 (1987), and *Doctor's Associates*, 517 U.S. at 686-687. Given the Court's sound conclusion that the last reference to "contract" in Section 2 of the FAA refers to state law, it follows that all the references to "contract" in Section 2 (a total of four) refer to state law. Furthermore, a court must decide issues concerning the applicability of the FAA, including whether a contract exists or whether there is a generally applicable contract defense to an arbitration clause.

Buckeye argues that *Prima Paint* is controlling authority for the proposition that an arbitrator must decide the illegality issue in this case. We agree that *Prima Paint* is relevant authority, but not in the way that Buckeye suggests. *Prima Paint* interpreted Section 3 of the FAA as applied to a case involving fraud in the inducement to a deal that was conceded to be a contract. In contrast, the issue in this case is whether there is a contract, which is required by Section 2 for the FAA to apply to validate the arbitration clause. Furthermore, Sections 3 and 4 do not apply in this case because they address the role of federal courts, and this case instead involves the role of a state court.

The Court in *Prima Paint* stated that the stay provisions of Section 3 only apply to the "kinds of contracts specified in §§ 1 and 2 of the Act...." *Prima Paint*, 388 U.S. at 401. The Court found it necessary to answer as "[o]ur first question" an issue under Section 2, specifically whether the contract in question was one in commerce and thus "within the coverage of the Arbitration Act." *Id.* at 401-402. Thus, *Prima Paint* is

not authority for the principle that the requirements of FAA Section 2 fall away when a stay of arbitration or an order to arbitrate is sought, even when Section 3 or 4 applies. Quite the contrary, *Prima Paint* is authority for a key point that is in issue in this case: that Section 2 requirements for FAA applicability are threshold questions for any court asked to compel arbitration or stay litigation under the FAA. As the U.S. Court of Appeals for the 7th Circuit has explained, "as arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved by the arbitrator." *Sphere Drake Ins. Ltd. v. All Am. Ins. Co.*, 256 F. 2d 587, 591 (2001) (holding that court must decide whether person who signed an arbitration agreement had authority to do so). *See also Sandvik v. Advent Int'l Corp.*, 220 F. 3d 99, 100-101, 109-110, & n. 7 (2000) (holding that court must decide whether the agent who signed a putative contract had authority and noting valid distinction between void and voidable contracts, the former not being contracts at all); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F. 2d 1136, 1140 , 1144 (1991) (same).

In *Prima Paint*, no issue was raised as to whether there was a contract. The very first sentence of Justice Fortas's opinion for the Court referred to the case as involving "a *contract* governed by the United States Arbitration Act of 1925" and also referred to the litigants as "the *contracting* parties." *Id.* at 397. [Emphasis added.] The Court determined that the contract was in interstate commerce and then stated, "Having determined that the *contract* in question is within the coverage of the Arbitration Act, we turn to the central issue in this case: whether a claim of fraud in the inducement of the entire *contract* is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." [Emphasis added.]

The plaintiff, Prima Paint, sought rescission of the contract on the basis of fraud in the inducement, but never questioned that a contract had been formed. Rather, the question presented was under Section 3, dealing with staying federal court litigation. The Court held that the language of Section 4, concerning whether there is an issue about "the making of the arbitration agreement," implicitly applies in Section 3 as well. *Id.* at 404. It certainly did not hold that an arbitration clause is enforceable even though no contract exists under state law.

II. UNDER FLORIDA LAW, CONSISTENT WITH LONGSTANDING PRINCIPLES OF CONTRACT LAW, A BARGAIN THAT IS VOID AB INITIO DUE TO ILLEGALITY IS NOT A CONTRACT.

A. A CONTRACT IS DIFFERENT FROM AN AGREEMENT.

It has long been understood that an "an agreement" is different from "a contract." An "agreement" is "an expression by two or more persons of assent," while a "contract" is "a promise, or set of promises, to which the law attaches legal obligation." These are the definitions in Sections 1 and 2 of Samuel Williston's 1920 treatise, WILLISTON ON CONTRACTS, VOL. I, 1-2. Thus, the distinction between an agreement and a contract was well understood when Congress enacted the FAA in 1925. Furthermore, given this understanding as well as the careful way the word "contract" is repeated four times in FAA Section 2, it is reasonable to conclude that the words "agreement" and "contract" in the FAA were not synonyms and were used to mean different things.

Drafting of the RESTATEMENT OF CONTRACTS (1932) began in 1923. See RESTATEMENT, Introduction, at ix. Therefore, the first RESTATEMENT is also evidence contemporaneous with the FAA of the meaning of the terms "agreement" and "contract." Given that Williston was the RESTATEMENT's Reporter, it is not surprising that the substance of his treatise definitions was used in the first RESTATEMENT definitions of contract and agreement in Sections 1 and 3. Section 1 defines a contract as "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Section 3 defines an agreement as "a manifestation of mutual assent by two or more persons to one another."

Williston's definitions also were carried forward in the RESTATEMENT (SECOND) OF CONTRACTS (1981), Sections 1 and 3. Comment a to Section 3 of the RESTATEMENT (SECOND) notes the way in which the meaning of agreement is broader than that of contract: "The word 'agreement' contains no implication that legal consequences are or are not produced." Another comment states that if the law "neither gives a remedy nor otherwise recognizes a duty of performance," then there is "not a contract at all." RESTATEMENT (SECOND), Section 7, cmt. a.

The Uniform Commercial Code (UCC) also distinguishes between "an agreement" and "a contract." An "agreement" is "the bargain of the parties in fact, as found in their language or inferred from other circumstances...." UCC, Section 1-201(b)(3) (2005 Official Text). A contract is the "total legal obligation that results from the parties' agreement...." *Id.* at Section 1-201(b)(12). Thus, like the Restatements, the UCC

emphasizes that the term "contract" entails legal obligation, not just factual agreement.

B. UNDER FLORIDA LAW, A CRIMINAL LOANSHARKING BARGAIN IS *VOID AB INITIO* AND THUS IS NOT A CONTRACT.

Section 2 reserves for the courts issues of contract law concerning whether a contract exists. These include formation issues under either of the two generally recognized forms of contract, contracts involving mutual manifestation of assent supported by consideration or those based on reliance on a promise (also known as promissory estoppel). *See* RESTATEMENT (SECOND) OF CONTRACTS, Section 1 (defining "contract"), Sections 17-81 (recognizing contracts with consideration) and Sections 82-94 (recognizing contracts without consideration). Absent a maritime transaction, the existence of a contract is a threshold question for FAA applicability. Thus, a case such as *Chastain v. Robinson-Humphrey Co.*, 957 F. 2d 851 (11th Cir. 1992), involving an issue of contract formation, is easy; a question about whether a party manifested assent to a deal is a question of contract formation to be decided under the first two references to "contract" in Section 2, not under Section 4. In *Chastain*, 957 F. 2d at 853-854, the court cited Sections 2, 3 and 4 of the FAA and held that a court must decide a challenge to the existence of any agreement at all, because in such circumstances, "there is no presumptively valid general *contract* which would trigger the district court's duty to compel arbitration pursuant to the Act." [Emphasis added.]

Another doctrine that goes to the existence of a contract is illegality that makes a bargain *void ab initio* as a contract. Florida state courts have refused to give legal recognition to illegal bargains on a number of occasions, both recently and going back to before the enactment of the FAA and before it was being applied in state courts, indicating the doctrine is a general one and not an attempt to avoid sending cases to arbitration. *See e.g. Stewart v. Stearns & Culver Lumber Co.*, 56 Fla. 570, 48 So. 19 (1908) (refusing to enforce an agreement in restraint of trade and stating, at 588, a standard summary of the doctrine of illegality, "The courts will not in general aid either party to enforce an illegal agreement, but will leave the parties where they place themselves with reference to such illegal agreement, except where the law or public policy requires action by the courts, or where the parties are not in pari delicto, and perhaps in other cases not pertinent here."); *Wechsler v. Novak*, 157 Fla. 703, 26 So. 2d 884 (1946) (refusing to overturn a judgment for the defendants where the plaintiff was said to have been retained to perform illegal services of corruptly influencing public officials and noting that "the general right to contract is subject to the limitation that the agreement must not violate the Federal or State Constitutions or state statutes..." and also stating that "[t]he doctrine relating to illegal agreements is founded on a regard for the public welfare and therefore each contract must have a lawful purpose."); and *Castro v. Sangles*, 637 So. 2d 989 (Fla. 3d DCA 1994) (refusing aid of the court to enforce a construction deal when the owner made a sworn and knowingly false statement that he was the "owner-builder" to the county permit authorities, when in fact he hired an unlicensed contractor in violation of a Florida statute).

Although the states vary in their approaches to illegality, the approach of Florida is one of the common variants and of longest pedigree. The RESTATEMENT (SECOND) OF CONTRACTS avoids the concept of illegality, preferring to treat illegality under the doctrine of unenforceability on grounds of public policy. *See* Vol. 2 at 5 (Introductory Note to Topic 1, Unenforceability in General, contained in Chapter 8 on "Unenforceability on Grounds of Public Policy"). Despite this position of the RESTATEMENT (SECOND), many courts continue to use the longstanding common law concepts of bargains void as illegal or void as against public policy. *See* Richard A. Lord, 5 WILLISTON ON CONTRACTS § 12.1 (4th ed., updated as of July 2004) (noting that the RESTATEMENT (SECOND) eschews use of the doctrine of illegality, but also stating that the courts "continue to speak in terms of illegality, and continue to search for classifications of which bargains will be held to be void for illegality or void as against public policy.")[7]

Thus, the RESTATEMENT (SECOND) is not descriptive of the common law of Florida and other states that continue to treat illegality as undermining the existence of a contract. The original RESTATEMENT OF CONTRACTS better reflects this continuing tradition. It includes a long chapter on "Illegal Bargains." *See id.* Vol. II, 982 et seq. By calling them "illegal bargains," the first RESTATEMENT avoids treating illegal transactions as contracts in cases where they are not enforced at all. The categories of illegality addressed by the RESTATEMENT are many, including bargains in restraint of

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[7] In the related doctrine of contracts against public policy, not raised in this case, courts sometimes divide the transaction into enforceable and unenforceable parts, but not where the public policy problem affects "the entire agreement" and makes it "an integrated scheme to contravene public policy." E. Allan Farnsworth, CONTRACTS 345 (4th Ed. 2004).

trade, wagers, usury, bargains tending to obstruct the administration of justice, bargains in violation of public or fiduciary duty, bargains tending to defraud or injure third persons, bargains prohibited by statute, bargains concerning domestic relations, and miscellaneous illegal bargains. *Id.* at Sections 513-597. Generalizations about all these forms of illegality are difficult, but the first RESTATEMENT did attempt to state principles about when illegal bargains are not legally enforced (and thus are not contracts under the longstanding definition that a promise or set of promises that is not legally enforced is not a contract). This first RESTATEMENT comment provides a good summary of principles:

> The statement that all illegal bargains are void is not wholly accurate. It is true that many such bargains are entirely without effect on the legal relations of the parties....When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law denies relief. Courts do not wish to aid a man who founds his cause of action upon his own immoral or illegal act. If from the plaintiff's own statement or otherwise it appears that the bargain forming the basis of the action is opposed to public policy or transgresses statutory prohibitions, the courts ordinarily give him no assistance. *See id.*, Vol. II, Section 598, cmt. a.

Another principle from the first RESTATEMENT is that an "unessential" illegal provision does not bar enforcement of the bargain. *Id.*, Section 603. A provision is unessential if it can be disregarded without defeating the "primary purpose" of the

transaction and if the rest of the contract can be performed with omission of the illegal portion. Thus, contrary to assertions of *amici* of Buckeye, the doctrine of illegality does not envision that a trivial illegality peripheral to the primary purpose of a deal makes the entire bargain *void ab initio* as a contract. In a criminal loansharking transaction, however, the loan at a very high rate of interest, in violation of criminal statutes, is the central purpose of the bargain.

The first RESTATEMENT contemplates that a centrally illegal bargain is void as a contract, meaning it is not given any legal effect as such, in order to discourage immoral or illegal acts that are against public policy. Furthermore, denying legal recognition to any aspect of an illegal deal makes "an important symbolic statement." Stewart Macaulay et al., CONTRACTS: LAW IN ACTION, Vol. I, at 511 (2d Ed. 2003). Of course, even when the existence of a contract is not recognized, the underlying behavior is still recognized and can be the basis of criminal prosecution or non-contractual civil remedies, particularly on behalf of the victim of criminal behavior, where use of a restitution cause of action or statutory remedies may be appropriate. For example, the first RESTATEMENT recognizes a general restitution principle that a party not in pari delicto in an illegal bargain can repudiate the bargain and recover any performance under it, not on the contract but in restitution. RESTATEMENT, Section 604.

The longstanding doctrine that certain illegal bargains are denied recognition as contracts is not an invention to attempt to evade the FAA; the doctrine is not directed specifically at arbitration but is applicable to the transaction as a whole. When illegal bargains are void as contracts, no clause is given

legal effect. As Lord Mansfield made clear in 1775, the policy is one of protecting the integrity of courts by avoiding having them give aid to a wrongdoer. *See Holman v. Johnson*, 1 Cowp. at 373. The doctrine protects not only courts as institutions, but also the rule of law. It seems highly unlikely that Congress intended to preempt this venerable doctrine when it enacted the FAA.

Court enforcement of any clause of a quintessentially criminal bargain validates the crime, and this is why some states choose the course of finding no contract at all when the illegality is central to the transaction. *See* RESTATEMENT, Section 603. The idea that centrally illegal bargains are void rather than voidable may seem formal, but in reality it is not. When a bargain is void for illegality, neither party can enforce it. This expresses the state's public policy and preserves the reputation as well as the integrity of the courts. On the other hand, when a bargain is merely voidable, an injured party can choose to affirm it and claim its benefits. Voidability protects one party against another, whereas voidness expresses the state's public policy that the type of transaction is noxious, should not be made at all, and therefore should be denied existence as a contract.

It is among the obvious possible policy reasons for a criminal loansharking statute that a person taking out a loan at a literally criminal rate of interest is not acting rationally and free from economic duress and thus cannot be said to have validly agreed to anything. Furthermore, given that the test for a finding of agreement to a contract is objective (manifestation of assent), a loanshark is not misled by its victim into thinking there is

valid agreement. This reasoning helps to explain the Florida common law conclusion of "no contract."

Particularly in cases of central and pervasive criminal illegality, it makes common sense to say that the bargain falls as a whole because criminals do not get valid agreement to anything and should not be able to enlist the courts to help them. If an arbitration clause in a written document were enough to guarantee court assistance, one could imagine a parade of horribles, with courts forced to aid alleged murderers, drug dealers, robbers, traders in human organs, videotapers of dressing rooms, dealers in dead bodies, sellers of trade secrets, or–as alleged in this case–loansharks. In appropriate cases, courts should be able to put a stop to contractual and judicial validation of criminal behavior by first deciding the question whether there is illegality that prevents valid making of a contract. Otherwise, courts as institutions would lose their integrity, dignity and reputations. This is the insight behind the common law doctrine of illegality making a bargain *void ab initio* as a contract. The first question for the Florida state court in this case is whether the transactions in question are contracts at all.

CONCLUSION

A state court asked to compel arbitration under the FAA must first decide a state law issue of illegality that determines whether a contract exists. The FAA only operates to validate an arbitration clause if FAA Section 2 threshold requirements are met. In this case, the Section 2 issue is whether there is a "contract." Therefore, the Florida Supreme Court reached the correct disposition of the case when it remanded it to the state

trial court to decide whether the allegedly criminal loansharking transactions were *void ab initio* as contracts.

Respectfully submitted,

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